IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-875

BLAKE CONSTRUCTION CO., INC., *Petitioner*,

v.

ALLIANCE PLUMBING AND HEATING CO., INC.

and

BOHN HEATING TRANSFER DIVISION, GULF AND WESTERN MANUFACTURING COMPANY, *Respondents*.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Petitioner, Blake Construction Co., Inc., respectfully submits the following response to Respondent's reply to our petition for certiorari to review the Opinion and Order of the District of Columbia Court of Appeals entered in this proceeding on July 3, 1978.

I. THE QUESTIONS PRESENTED BY THE PETITION ARE APPROPRIATE FOR REVIEW.

A. Where a District of Columbia Provision Is Required to Be Identical With the Analogous General Federal Provision, Its Interpretation Is Not a Purely "Local" Matter for Purposes of Considering Whether *Certiorari* Should Be Granted.

Respondent argues that the case is not a proper one for *certiorari* because, *inter alia,* it involves "local" rules. (Brief for Respondent at 16.) We agree with the principle that statutes peculiar to the District of Columbia should ordinarily be interpreted by the District of Columbia Court of Appeals, even though they are Acts of Congress. However, the Rules of Civil Procedure of the Superior Court of the District of Columbia were required by Act of Congress to be identical with the Federal Rules of Civil Procedure unless changed by the District of Columbia Court of Appeals.[1] Indeed, respondent implicitly recognizes the non-"local" character of the D.C. Rules, resulting from that requirement, by the various references in its brief to the decisions of the federal courts interpreting Rule 17 of the Federal Rules of Civil Procedure.[2]

This Court had several occasions to consider when a question was truly "local" during the period when review was by *certiorari* to the United States Court of Appeals for the District of Columbia Circuit. In *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285 (1935), the Court took review of an action in which a District statute adopted the language of a national statute where a decision as to the former constituted a precedent of national application. Similarly, in *Miller* v. *United States,* 357 U.S. 301 (1958), the court took review of a case involving a rule which was "substantially identical" to the language of a federal statute.

[1] Petitioner's Brief for Certiorari at 9.

[2] Brief for Respondent at 12.

Even in cases which have truly involved legal rules applicable only within the District of Columbia, the court has, in proper cases, granted *certiorari.*[3] Where, as here, Congress has made it clear that judicial proceedings in the District of Columbia courts are to be conducted under the same rules as the proceedings in the federal courts, except when there has been a conscious decision to do otherwise, and no such decision has been made with regard to the rules in question, we are not dealing with a merely local rule.

B. Petitioner's First Question Presented Certain Issues of General Significance and Importance for the Conduct of Civil Actions.

Respondents argue that *certiorari* should not be granted in this case because "the first question involves a determination important only to the litigant in this action." We disagree. The question presented goes to the nature of the interest required by a party to maintain an action for breach of contract under the Federal Rules of Civil Procedure. Further, with regard to the denial of leave to amend the complaint to bring in the owners, the first question requires the Court to reconcile the interest of defendants in notice and certainty in what they must answer to, with the philosophy of the Federal rules that cases should be decided on the merits.[4] These underlying issues certainly go be-

[3] See generally R. Stern and E. Gressman, Supreme Court Practice § 6.27 (5th ed. 1978).

[4] *United States* v. *Hougham,* 364 U.S. 310 (1960).

yond the specific facts in this case. We submit that the questions are important, and that they are as well viewed through the prism of these facts as any other which may be presented.

The cases cited by respondent on this point have to do with one situation which *could not* recur because of subsequent enactment of a state law dispositive of the merits, *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955), and one in which an apparent conflict between circuits was found on closer examination not to exist. *Layne and Bowler Corp.* v. *Western Well Works,* 261 U.S. 387 (1923).

Each case that comes to the Court of necessity contains unique and sometimes complex details. But in a world in which the citadel of privity is crumbling, both in Tort and Contract law,[5] the alignment of interests presented here is likely to occur, with variations, enough to make it a useful vehicle.

II. THE VIOLATIONS OF RULE 17(a) RENDER ABUSIVE THE DENIAL OF LEAVE TO AMEND AND DISMISSAL OF THE COUNTERCLAIM.

With respect to respondent's argument on the merits that Blake is not a real party in interest there are several crucial legal and factual misstatements.[6] First, respondent states that Blake had presented no evidence of "cognizable" damages. Since in our view Rule 17(a) authorizes the party in privity to prosecute an action for breach of contract even where another party in the

[5] Petitioner's Brief for Certiorari at 11.

[6] The second part of Rule 17(a), providing that a reasonable opportunity be given to bring in the real party in interest, was inherently involved in the trial court's denial of leave to amend.

chain of privity suffers the ultimate loss, we do not regard this as dispositive. However, there is a basis on which Blake is entitled to recover for the breach in its own right: the basic contract damages rule that a person who delivers something less than what he promises must pay the buyer the difference in value between what he delivered and what he promised.[7]

Respondent now seeks to secure its economic windfall by virtue of the judicial windfall that occurred when the court dismissed the case before it presented evidence of damages under the theory it preferred.

Respondent cites *Grafe-Weeks Corporation*[8] with regard to threatened or possible loss. In that case the claim the prime contractor sought to assert against the owner on behalf of a subcontractor was based on alleged interference conduct by the owner, to the detriment of the subcontractor. The prime contractor did not *ipso facto* stand in breach of its obligation to the subcontractor, and indeed perhaps the dispute was entirely between the subcontractor and the building owner. In our case, on the other hand, the breach by the subcontractor put Blake into breach with the building owner and at the same time gave rise to a direct claim by Blake against the subcontractor. Accordingly, we do not regard the *Grafe-Weeks* case as applicable to ours.

[7] "[D]amages are measured by the difference between the value of the item installed and the value of the item specified in the contract." Third-Party Defendant's Memorandum in Response to Pretrial Order Concerning Measure of Damages at 2, citations omitted.

[8] *Grafe-Weeks Corp.* v. *Air Products, Inc.*, 32 F.R.D. 211 (W.D. Pa., 1963).

Similarly, respondent argues that the court below was under no obligation pursuant to D.C. Rule 17(a) to provide a reasonable opportunity to bring in the real party in interest assuming, *arguendo,* that Blake was not, with respect to the claim for consequential damages, the real party in interest. Respondent cites *Hobbs* v. *Police Jury of Morehouse Parish* [9] for the proposition that the rule's requirement that a reasonable opportunity be allowed to bring in the real party in interest is limited to situations where determination of the proper party to sue is difficult or when an understandable mistake has been made. (Brief for Respondent at 12.) In the first place, as we have indicated, because Blake was in privity with Alliance and in view of the express provision of Rule 17(a) that contract actions may be maintained by the party with the legal right to enforce the contract it is, at best, not beyond question that Blake was not the party to sue.

In *Hobbs* the initial plaintiff in an action to challenge a referendum was totally unqualified to vote on the referendum and that was known at the time of filing the action. In that context the court denied leave to allow substitution of qualified voters relating back to the original day of the action. However, even there the court explicitly declined to hold that it would have denied substitution if an ordinary statute of limitations problem had been presented. 49 F.R.D. 179. In that case the right to challenge the bond issue was considered *"peremptory"* which meant that by a quirk of Louisiana law, perhaps originating from the civil law, the right itself was extinguished at the expiration of the time period. *Id.* This is distinguished from *"prescription,"* which, as with the statute of limitations, simply made available a possible plea in defense. *Id.*

[9] 49 F.R.D. 176 (W.D. La., 1970).

III. GIVING ADVERSE WEIGHT TO INSISTENCE ON THE RIGHT TO A JURY TRIAL RAISES A CONSTITUTIONAL QUESTION.

Respondent argues that Petitioner was not "coerced" into giving up its right to a jury trial and that, therefore, no constitutional question was presented. The D.C. Court of Appeals did not directly address the question of the power of the trial court to make waiver of jury trial a condition of bringing in the building owner because, it said, the trial court had not made waiver a *condition* of bringing in the building owner, but had considered the jury issue as one of several factors going to his discretion. The Court of Appeals' interpretation of the trial court's treatment of the motion is merely *post hoc* rationalization to avoid the implications of the trial court's action: a refusal to consider the pro's and con's of the motion of Blake once BGW insisted on its right to a jury trial. Taking the position that the jury trial was only *one* factor instead of *the* factor is a way to decide a constitutional question without saying that you have so decided. Would the judge have been allowed to even *consider* waiver of the right to counsel, or to cross-examination, as a condition of bringing parties with a substantial interest before the court?

Respondent cites *Hostrop* [10] for the proposition that the court "may permit the amendment under conditions designed to cure the adversities" (*i.e.,* requiring waiver of right to a jury trial) (Brief for Respondent

[10] *Hostrop* v. *Board of Junior College District #515,* 523 F.2d 569 (7th Cir. 1975).

at 15.) But in *Hostrop,* the trial court struck the jury demand which accompanied a motion at the eve of trial to add a new count for damages to a case which previously contained no jury issue. The court recognized the possibility that waiver could be appropriate but demonstrated in the same passage how courts seek to assure that the important right is not unnecessarily limited. Reviewing the trial judge's explanation for striking the jury demand, the court found that it was stricken on the ground that it was untimely filed (which was erroneous if it was only available when the new count was introduced). The Court of Appeals went on to say "we can hardly affirm an exercise of discretion that did not occur, and therefore must consider whether plaintiff was otherwise entitled to a jury trial." 533 F.2d 569, 581 (7th Cir. 1975). Once the court concluded that the trial judge had actually based his striking of the jury demand on the ground that the demand was untimely, the court did not analyze the competing claims on the trial judge's discretion, but rather examined the substance of the proposed amendment to the complaint to determine if it raised new matter or could fairly be said to be embraced in the original action. The relevance to our case is that the focus of review is on what the trial judge actually relied on in his ruling. In this case, we contend that the trial judge did not exercise his discretion with regard to the competing considerations once the decision was made by the building owner to waive his right to jury trial.

It may be that the case can be disposed on the truly separate statutory grounds, as we urge elsewhere, but that possibility does not mean that no constitutional question is presented, for purposes of deciding whether to grant certiorari.

CONCLUSION

This case presents important questions regarding the operation of the Federal Rules of Civil Procedure in the Courts of the District of Columbia, and the weight to be given the constitutional right of trial by jury. For the reasons set forth in our petition for certiorari and this reply, we respectfully request the Court to grant the petition.

Respectfully submitted,

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